



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 203 and 212**

**[Docket DARS-2022-0013]**

**RIN 0750-AL36**

**Defense Federal Acquisition Regulation Supplement: Prohibition on Award to Contractors That Require Certain Nondisclosure Agreements (DFARS Case 2021-D018)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021 that prohibits the award of any DoD contracts to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict its employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative of DoD authorized to receive such information.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly R. Ziegler, telephone 703-901-3176.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

DoD published a proposed rule in the **Federal Register** at 87 FR 37470 on June 23, 2022, to implement section 883 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 883 prohibits the award of a DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative within DoD authorized to receive such information. The statute also requires entities to inform its employees of the limitations on confidentiality agreements or other statements. Offerors are required to represent compliance with the statutory restrictions in the System for Award Management prior to submitting an offer or quote.

The requirements of section 883 closely resemble those provided in section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), which was implemented at Federal Acquisition Regulation (FAR) 3.909, Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements (82 FR 4717, dated January 13, 2017). Since the prohibition at section 743 applies Governmentwide, DoD is

currently complying with section 883 based on the FAR application of section 743 to employees and contractors.

One respondent submitted a comment in response to the proposed rule.

## **II. Discussion and Analysis**

DoD reviewed the public comment in the development of the final rule. The respondent provided a comment about the definition of the term "entity" as it pertains to the application of the rule, which is outside of the scope of this rule. No changes were made in the final rule.

## **III. Applicability to Contracts at or below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), and for Commercial Services**

This rule implements section 883 of the NDAA for FY 2021 (Pub. L. 116-283) but does not create any new solicitation provisions or contract clauses. The rule does apply DFARS clause 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, to contracts valued at or below the SAT and for commercial services and products, including COTS items. The rule, at DFARS 203.909-3, also prescribes use of Federal Acquisition Regulation (FAR) provision 52.203-18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation, and FAR clause 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements. The FAR clause and provision, except

for personal services contracts, are already prescribed for use in acquisitions at or below the SAT; and the FAR clause 52.203-19 is also prescribed for use in commercial acquisitions.

*A. Applicability to Contracts at or below the SAT*

41 U.S.C 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

*B. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products, Including COTS Items*

10 U.S.C. 2375 (redesignated as 10 U.S.C. 3452) governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial services and commercial products, including COTS items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial services and commercial products, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil

penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial product and commercial service contracts, the provision of law will apply to contracts for the acquisition of commercial products and commercial services. Due to delegations of authority, the Principal Director, DPC is the appropriate authority to make this determination. DoD intends to apply this rule and the corresponding statutes (10 U.S.C. 2409 and section 883 of the NDAA for FY 2021) to acquisitions at or below the SAT and for commercial services and commercial products, including COTS items.

#### *C. Determination*

DoD intends to apply the requirements of 10 U.S.C. 2409 and section 883 of the NDAA for FY 2021 to contracts at or below the SAT and those awarded under FAR part 12 procedures because the statutory protections are intended to apply to any employee of a contractor or subcontractor who discloses or may be restricted from disclosing evidence of waste, fraud, and abuse. The statutes only exempt the application to elements of the intelligence community.

10 U.S.C. 2409 provides contractor employees protection from reprisal for disclosure of waste, fraud, and abuse to designated persons and bodies identified in the statute. An employee of a contractor or subcontractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for such a

disclosure. The statute does not apply to elements of the intelligence committee.

Section 883 prohibits the award of any DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict its employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative of DoD authorized to receive such information.

It is not in the best interest of the Federal Government to exempt application of this rule to actions at or below the SAT or to commercial services and commercial products (including COTS items). An exception for contracts at or below the SAT and those for commercial services and commercial products (including COTS items) would exclude the majority of the contracts and individuals intended to be protected under the laws, thereby undermining the overarching public policy purpose of the laws.

#### **IV. Expected Impact of the Rule**

This proposed rule is not expected to have a significant impact on the public or Government agencies because the requirements of section 883 have already been implemented Governmentwide at FAR 3.909. DoD-specific implementation of section 883 would duplicate the previous implementation of section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) as implemented Governmentwide in the FAR.

## **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## **VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

## **VII. Regulatory Flexibility Act.**

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* and is summarized as follows:

This rule amends the DFARS to implement section 883 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 883 prohibits the award of a DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative within DoD authorized to receive such information.

The objective of the rule is to implement the DoD-specific statute that removes restrictions on the ability of employees to report waste, fraud, or abuse to the appropriate DoD authorities.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will apply to all small entities that are eligible to receive DoD contracts; however, the requirements of section 883 are already met through the Governmentwide implementation of a previously published prohibition at FAR 3.909 and in the System for Award Management (SAM) representations and certifications. As a result, the 361,000 unique small entities registered in SAM as of January 12, 2021, are already compliant



with these requirements and will not be required to take any additional action to comply with the DoD-specific prohibition in section 883.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

There are no practical alternatives that will accomplish the objectives of the statute.

#### **VIII. Paperwork Reduction Act**

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 203 and 212**

Government Procurement

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*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 203 and 212 are amended as follows:

1. The authority citation for parts 203 and 212 continues to read as follows:

**Authority:** 41 U.S.C 1303 and 48 CFR chapter 1.

#### **PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST**

2. Revise section 203.900 to read as follows:

##### **203.900 Scope of subpart.**

This subpart implements 10 U.S.C. 2409 and section 883 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L.

116-283).

(a) (i) 10 U.S.C. 2409 provides DoD whistleblower protection policies and procedures for contractor employees. Use sections 203.901 through 203.906 of this subpart in lieu of FAR sections 3.901 through 3.906 to implement 10 U.S.C. 2409.

(ii) 10 U.S.C. 2409 does not apply to any element of the intelligence community, as defined in 50 U.S.C. 3003(4). Sections 203.901 through 203.906 do not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(A) Relates to an activity or an element of the intelligence community; or

(B) Was discovered during contract or subcontract services provided to an element of the intelligence community.

(c) Section 883 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283) prohibits the award of a DoD contract to contractors that require their employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative within DoD authorized to receive such information.

3. Add sections 203.909 and 203.909-3 to read as follows:

**203.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.**

**203.909-3 Solicitation provision and contract clause.**

Use the provision at FAR 52.203-18, Prohibition on Contracting with Entities That Require Certain Internal Confidentiality Agreements or Statements—Representation, and the clause at FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, prescribed at FAR 3.909-3 to implement section 883 of the National Defense Authorization Act for Fiscal Year 2021.

4. Revise section 203.970 to read as follows:

**203.970 Contract clause.**

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

**PART 212-ACQUISITION OF COMMERCIAL ITEMS**

5. Amend section 212.301—

a. In paragraph (f)(i), by redesignating paragraphs (f)(i)(C) and (D) as paragraphs (f)(i)(D) and (E); and

b. By adding a new paragraph (f)(i)(C).

The addition reads as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(f) \* \* \*

(i) \* \* \*

(C) Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, as prescribed in 203.970, to comply with 10 U.S.C. 2409.

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